Regulatory Lies and Section 6(c)(2): The Promise and Pitfalls of the CFTC’s New False Statement Authority

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INTRODUCTION

Among the many changes wrought by Dodd-Frank was the grant of a significant but little-noticed power to the Commodity Futures Trading Commission (CFTC) to bring civil enforcement actions against those who make false representations to the Agency.1 Under the provision, the CFTC can bring an action for a statement made in any context, and the Commission need not refer the matter to the Department of Justice (DOJ) for criminal prosecution under 18 U.S.C. § 1001, as has traditionally been the practice.2 Nor must the CFTC demonstrate that the speaker knowingly lied. Instead, the CFTC can bring a false statement enforcement action subject to a preponderance of the evidence standard, and it need only prove that the speaker reasonably should have known a statement was

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2. See Mandy Roth, What's Up at the CFTC?, COMPLIANCEEX (May 4, 2012), http://complianceex.com/what%E2%80%99s-up-at-the-cftc (“In the past, the Commission relied on the criminal agencies to go after liars.”).
false—a power denied to all other financial regulatory agencies, including the Securities and Exchange Commission (SEC). The SEC’s former director of enforcement, Robert Khuzami, has said in reference to the CFTC’s broad new false statement authority, “Frankly, I wish we had the power the CFTC has.”

This statutory grant of power, a single sentence amending section 6(c)(2) of the Commodities Exchange Act, was tucked with little fanfare into a small corner of the Dodd-Frank Act. Although the provision has gone unnoticed by academic commentators, it has the potential to effect a sea change in the federal financial regulatory enforcement scheme. With its broad language and scope, section 6(c)(2) permits the CFTC to deter individuals and companies from lying to investigators. But because the statute fails to provide meaningful safeguards

3. See id. ("Significantly, the CFTC, under Dodd-Frank, is now permitted to bring civil actions against individuals for making false statements to the CFTC, which is new in the non-criminal enforcement space."); see also 42 U.S.C. § 2282 (2006) (permitting civil penalties only for false statements made in certain required reports filed with the Atomic Energy Commission); 49 U.S.C. § 47126 (2006) (permitting criminal prosecution under Title 18 for persons who, with intent to defraud the government, knowingly make false statements to the Secretary of Transportation only in the context of grants and reports); Hon. Joseph T. Kelliher, Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission, 26 Energy L.J. 1, 24 (2005) ("For example, the [Federal Energy Regulatory] Commission has no authority to impose a civil penalty on parties that make material false statements to the Agency.").


6. The provision was added as part of a larger amendment introduced by Senator Maria Cantwell and aimed at expanding the CFTC’s ability to combat market manipulation. Neither the floor statements nor the committee nor the conference report mentions the provision beyond noting its existence. See H.R. Rep. No. 111-517 (2010) (Conf. Rep.) (failing to make any mention of the provision); 156 Cong. Rec. S3,347-48 (daily ed. May 6, 2010) (statement of Sen. Cantwell introducing and discussing the amendment).

against agency overreach, it illustrates pitfalls that should be avoided in any future attempts to grant similar powers to other regulators. While Congress would do well to heed Khuzami's request and give other regulatory agencies the same comprehensive authority to bring enforcement actions for false statements, legislators should carefully limit this power through heightened intent requirements or other safeguards designed to reduce the potential for agency abuse.

In Part I, I begin by examining the scope of section 6(c)(2) and its much-needed enhancement of the CFTC's regulatory flexibility. I demonstrate that the provision is a significant departure from the existing regulatory framework: the law provides for liability for a wider range of statements; permits the CFTC to pursue actions without meeting the high standard of proof beyond a reasonable doubt; does not require referral to the DOJ; and specifies a mens rea standard of mere negligence. These developments permit the CFTC to incentivize truth-telling and to punish those who engage in cover-ups of wrongful activity.

In Part II, I explore the provision's dark side by comparing it to 18 U.S.C. § 1001, the federal false statement statute, in order to demonstrate that section 6(c)(2) lacks necessary safeguards and is open to significant agency abuse. While section 1001 has itself been criticized by academics and judges for being overbroad and subject to prosecutorial abuse, section 6(c)(2) goes significantly further in both respects. The potential for abuse is further illustrated by a recent CFTC enforcement action against a clerical worker, which shows that even a witness who is not charged with other unlawful activity and who corrects her false statements in the course of a single interview can face significant liability.

Finally, in Part III, I survey several adjustments that could be made to the provision in order to prevent abuse and facilitate the grant of this power (with appropriate safeguards) to other regulators. These changes—many of them drawn from academic work on section 1001—including the resurrection of an "exculpatory no" doctrine to limit the types of statements that could give rise to liability, as well as a heightened mens rea requirement that would protect speakers who did not knowingly lie or recklessly disregard the truth.

I. A New Tool: The Contours of Section 6(c)(2)

The amended section 6(c)(2) of the Commodities Exchange Act makes it unlawful "for any person to make any false or misleading statement of a material fact to the Commission." Under the provision, the false statement could, but need not, occur in the context of a registration application or a report filed with the Commission. And the misstatement need not be willful—the CFTC must only prove that the individual "knew or reasonably should have known" that a statement was inaccurate. The breadth of the provision is particularly striking when contrasted with existing civil false statement provisions, which prohibit

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8. Commodities Exchange Act § 6(c)(2).
9. Id.
10. Id.
false statements only in narrowly cabined areas: employing deceptive devices via interstate mail in connection with the purchase of securities,\(^1\) making false statements in connection with swap agreements,\(^2\) or making false reports to manipulate the price of commodities.\(^3\) Furthermore, the Commission itself has the power to bring an enforcement action against any person it believes has violated this provision, without referring the matter to the DOJ for criminal prosecution.\(^4\) The scope of this power is broad. As the CFTC itself has stated, section 6(c)(2) "expands the prohibition against false statements made in registration applications or reports filed with the Commission to include any statement of material fact made to the Commission in any context."\(^5\) After proving that the defendant made false statements, the CFTC may revoke or suspend the defendant's registration with the Agency or assess substantial civil monetary penalties—as much as $140,000, or triple the monetary gain from the violation, for each false statement.\(^6\) The provision thus enables the CFTC to take independent action to punish a vast swathe of behavior—lies in any form—that previously lay outside its jurisdiction and could be pursued only by a referral to the DOJ.

A. The Scope of the Transformation

The new section 6(c)(2) works a significant change in the CFTC's regulatory regime. First, as noted above, the provision broadens the scope of statements that can give rise to civil liability—false statements made to the CFTC in any context are now actionable.\(^7\) Second, the provision permits the CFTC to bring a false statement enforcement action itself rather than referring alleged violations to the DOJ for criminal prosecution. Third and relatedly, because section 6(c)(2) authorizes civil enforcement actions rather than criminal prosecutions, the CFTC need only prove its case by a preponderance of the evidence. Fourth, the provision allows the CFTC to succeed in an enforcement action if it can prove that a

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12. Id. § 78i.
14. Id. § 13a-1.
17. Before the passage of Dodd-Frank, § 6(c) prohibited only false statements made in applications and reports to the Commission. 7 U.S.C. § 9 (2006).
speaker "reasonably should have known" that a statement was false, even if the speaker did not have actual knowledge and did not recklessly disregard the truth.\textsuperscript{18}

In order to appreciate the scope of the change, it is helpful to examine the CFTC's enforcement options before the passage of Dodd-Frank. Before section 6(c)(2) was amended, false statements made to the CFTC in most contexts could be addressed only through criminal prosecution under the False Statement Act, 18 U.S.C. § 1001. That statute makes it a federal crime to "knowingly and willfully" make "any materially false, fictitious, or fraudulent statement or representation" in any matter within the jurisdiction of the executive branch of the United States.\textsuperscript{19} The government famously utilized section 1001 in the prosecution of Martha Stewart, who in 2004 was convicted of making false statements to the SEC and FBI.\textsuperscript{20}

Under the pre-Dodd-Frank regime, investigation subjects were rarely punished for lying to regulators, as several structural features of section 1001 tend to preclude prosecutions for all but the most extreme violations of the law. First, under section 1001, the CFTC cannot itself initiate an action based upon a defendant's false statements; instead, it is forced to refer violations to the DOJ or a U.S. Attorney's Office for criminal prosecution. And because a violation of section 1001 is a criminal offense, the government is required to prove its case beyond a reasonable doubt. This state of affairs means that prosecutions under section 1001 are only brought for violations that are (a) so severe as to convince the DOJ that they warrant the expenditure of its own resources based on a referral from the CFTC, and (b) so clear as to be provable beyond a reasonable doubt. Historically, this has meant that such prosecutions were almost never brought. As representatives of the CFTC are reported to have recently stated, most "cases of false information or testimony to the Commission are too 'piddly' (i.e., not substantial enough) to refer to the criminal agencies. The standard of proof required at the criminal agencies is too high and the penalties too low."\textsuperscript{21} This is still the state of affairs at the SEC and other similar regulatory agencies.\textsuperscript{22}

\textsuperscript{18} Before amendment, § 6(c) prohibited only "willfully" made statements or omissions. \textit{Id.}
\textsuperscript{20} \textit{See} United States v. Stewart, 433 F.3d 273, 281 (2d Cir. 2006).
\textsuperscript{21} \textit{See} Roth, \textit{supra} note 2 (summarizing panel discussion with representatives of the SEC and CFTC).
\textsuperscript{22} \textit{See} David R. Chase \& Neal Wilson, \textit{When the SEC Comes Knocking: What to Do When Faced with an "Enforcement Investigation,"} \textbf{BUS. L. TODAY}, May/June 2000, http://apps.americanbar.org/buslaw/blt/bltommay-sec.html (discussing the SEC's options for pursuing false statements, such as referral to DOJ for prosecution under section 1001 or provision criminalizing obstruction of justice, but failing to mention any comprehensive civil false statement authority). \textit{But see} Stewart, 433 F.3d at 281 (upholding conviction of defendant for making false statements to SEC representatives as well as FBI agents); United States v. Hirst, No. CR 11-0157 SBA, 2012 WL
Section 6(c)(2) grants the CFTC significantly more flexibility than section 1001, and accordingly can be more easily used by the Commission to deter lying and punish otherwise untouchable defendants. First, the mens rea requirements for section 6(c)(2) are significantly lower than those of section 1001. Section 1001 requires a defendant to make a false statement "knowingly and willfully"—that is to say that the defendant must have known the statement was false and intended to deceive. Even 7 U.S.C. § 13(a), which permits the CFTC to bring an enforcement action against those who make false statements to self-regulatory entities and boards of trade, requires "willful" falsification or "knowing" misstatement. By contrast, the CFTC may commence an enforcement action under section 6(c)(2) whenever a defendant "knew, or reasonably should have known" that the statement was false or misleading. This significantly reduces the challenges faced by the Commission, which can succeed in an enforcement action without inquiring into the subjective state of mind of the defendant.

Furthermore, unlike a criminal proceeding in which the government must prove its case beyond a reasonable doubt, CFTC enforcement actions employ only a "preponderance of the evidence" standard. This is not, in itself, surprising: preponderance of the evidence is the default standard in civil actions. But,
as I discuss below, in conjunction with the lowered mens rea requirements and the ability to independently pursue false statement violations, the reduced burden of proof dramatically expands the CFTC’s enforcement options.

B. Section 6(c)(2) Provides Deterrence and Much-Needed Enforcement Flexibility

Section 6(c)(2) is therefore a powerful tool indeed. To succeed in an enforcement action under the provision, the CFTC must merely prove (1) by a preponderance of the evidence,\(^\text{29}\) that a person (2) made a material false or misleading statement\(^\text{30}\) (3) to the Commission, and that the person (4) reasonably should have known the statement was false.\(^\text{31}\) The statement can have been made at any time, and the defendant need not have been under oath; indeed, the defendant need not even have been the subject of an investigation.

The provision will encourage investigation subjects and potential witnesses to tell the truth and disincentivize lying to the CFTC.\(^\text{32}\) Before the passage of Dodd-Frank, an investigation subject could feel far more comfortable fudging the truth in an interview with the CFTC, as any misstatement would have to be so severe as to warrant referral to the DOJ and the expenditure of scarce prosecutorial resources in a separate criminal action. The violation would also have to be sufficiently obvious to allow the DOJ to prove, beyond a reasonable doubt, that the subject knowingly and willfully lied. But under the amended section 6(c)(2), the making of false statements can easily lead to the addition of another charge in an enforcement action, putting potential liars on notice that even smaller and less clear-cut lapses in truth telling could come back to haunt them.

Investigation subjects will also be more likely to do their homework before making statements, as a subject may be held liable for statements she “reasonably should have known” were false—even if those statements are made casually.\(^\text{33}\) And charges under section 6(c)(2) can simply be added to a complaint if wrongdoers attempt to frustrate the CFTC’s investigations, allowing the Commission to easily increase the penalties for investigation subjects who attempt to obstruct

\(^{29}\) See supra notes 27 and 28 and accompanying text.

\(^{30}\) That is, the statement must have “a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.” United States v. Gaudin, 515 U.S. 506, 509 (1995) (quoting Kungys v. United States, 485 U.S. 759, 770 (1988)).

\(^{31}\) See Commodities Exchange Act § 6(c)(2).


\(^{33}\) See Commodities Exchange Act § 6(c)(2).
its activities. Indeed the CFTC has been employing precisely this strategy, adding section 6(c)(2) charges to a variety of enforcement actions.34

The CFTC has publicly recognized the scope and power of the new tools provided by Dodd-Frank. David Meister, former Director of Enforcement at the CFTC, has stated that the new false-statement provision is one of a “number of new tools and we are pleased with that and we will use these tools in the most efficient way possible to enforce the Dodd-Frank Act.”35 After one successful false statement action, Meister stated, “When a witness walks into CFTC testimony he or she should plan to tell the truth to every question or face the consequences. We will use the new Dodd-Frank false statements provision . . . to make sure it is well understood that lying is not an option.”36 The Commission’s actions have borne out Meister’s confidence: in fiscal year 2012, the CFTC brought 102 enforcement actions, the largest number in years, and initiated more than 350 new investigations—among the largest crop in the CFTC’s history.37

Several recent enforcement actions reveal the possible utility of the new provision. CFTC v. Newell,38 for instance, demonstrates the CFTC’s ability to increase penalties for investigation subjects who make false statements to hide their unlawful activity from the Commission. The underlying charge in the case was that Donald Newell and his fund engaged in a scheme to place commodity trades without specifying for which account the trades were intended, in violation of CFTC regulations. After placing the trades, Newell would wait to see whether the trade was profitable before allocating it either to the company’s proprietary ac-


count (if it was highly profitable) or to the customer accounts (if it was less profitable)—thereby fraudulently earning a profit of up to $1.1 million for the company at the expense of its customers.39

The false statement charges against Newell arose from his attempts to conceal this activity. Once the investigation into his company was underway, Newell stated in sworn testimony that “he always, or almost always, provided the Proprietary Account numbers when entering orders for that account by telephone,” whereas in fact he “rarely, if ever, provided a specific account number when he called [the] trade-desk to initiate trades.”40

Newell makes clear the importance of section 6(c)(2)’s mens rea standard. The CFTC, in accordance with the provision’s requirements, alleged only that “Newell knew or should have known these statements were false or misleading.”41 In other words, the CFTC did not aim to demonstrate that Newell made the statements with the intention to deceive the Commission. And because success on the underlying fraud charge requires proving that Newell did not provide account numbers when placing trades, if the CFTC proves fraud it will almost certainly also succeed on its false statement claim as well. By including a charge under section 6(c)(2), the CFTC therefore has an easy method to punish Newell for his attempt to hide his activities, while also making clear to future investigation subjects that lies and misstatements will not be tolerated.

One of the CFTC’s highest-profile cases, the investigation into MF Global and former New Jersey governor Jon Corzine, also relied heavily on false statement charges under section 6(c)(2).42 At the heart of that case was the allegation that MF Global had improperly used customers’ segregated accounts. The CFTC’s complaint included four counts, one of which accused MF Global of violating section 6(c)(2). The CFTC alleged that MF Global had filed multiple false reports with the Commission which misstated the funds’ use of customer accounts.43 The case ultimately settled, with MF Global ordered to pay more than one billion dollars in restitution and one hundred million dollars in civil penalties.44 Although the penalty was not apportioned by violation, the final consent order specified that MF Global was liable for violating section 6(c)(2).45 The provision worked perfectly, as MF Global was punished not only for its underlying wrongful behavior but also for attempting to hide that behavior from the CFTC. And because it is far easier to show that figures in reports are false than to prove

40. Id. at ¶¶ 65-66.
41. Id. at ¶ 67.
43. See id. at ¶¶ 90-99.
44. See Final Consent Order, MF Global (No. 13-cv-4463) (June 27, 2013).
45. See id. at Part III, ¶ 3.
complex financial fraud, section 6(c)(2) provides a safe fallback for the CFTC if its underlying charges failed.

Section 6(c)(2) even allows the CFTC to punish and deter false statements after legal proceedings have begun. In one recent case, the CFTC amended its complaint to add false statement charges based on alleged misrepresentations contained in a letter submitted by defendants' counsel to the CFTC. This was so even though the CFTC did not allege that counsel had filed the statements with the intent to deceive or that the statements caused harm or actually deceived the Commission. By employing section 6(c)(2) in this manner, the CFTC sends a powerful signal to attorneys and their clients that it will not tolerate inaccuracies and misstatements.

II. Hidden Dangers and the Parallels to Section 1001

The potential reach of section 6(c)(2) is particularly striking, given that many courts and commentators have criticized the breadth of the far more conservative provisions of section 1001. Judge Kavanaugh of the D.C. Circuit, hardly a judicial firebrand, recently noted the ever-increasing scope of false statement prosecutions and warned that "section 1001 prosecutions can pose a risk of abuse and injustice." The media has picked up the theme, with commentators fretting that prosecutors use the statute "to beef up weak indictments," in many cases, and

47. The Amended Complaint merely alleges that the defendants "knew or reasonably should have known" that the statements in counsel's letter were false. Id. at 58.
observing that the statute is the tool prosecutors turn to "when all else fails." In one academic commentator worries that investigators "need only informally approach the suspect and elicit a false reply and they are assured of conviction with a harsh penalty even if they are unable to prove the underlying substantive crime." In the Martha Stewart case, for example, some observers claimed that prosecutors brought charges under section 1001 only when they were unable to make their initial case. One conviction under section 1001—overturned by the Eleventh Circuit—was even more egregious: a notary, who had failed to comply with state law requiring her to notarize only documents that were signed in front of her, was prosecuted after falsely telling an IRS agent that she had complied with this requirement in notarizing a particular document. In another case, a government employee was successfully prosecuted for falsely denying having ever been a member of the Communist Party in an informal interview. Even a Supreme Court Justice has worried about the statute's scope. Justice Ginsburg has wondered about "the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes" via the statute.

These concerns regarding the scope of section 1001 motivated the formulation of an "exculpatory no" doctrine by several circuit courts, which held that an individual's false denial of guilt to federal agents (simply saying "no, I didn't do it") does not violate the statute. The doctrine was meant to avoid criminalizing a defendant's protestation of innocence, which courts felt was an unavoidable outgrowth of human nature, as well as constitutionally protected by the Fifth Amendment. Despite this rationale, the Supreme Court emphatically rejected the "exculpatory no" doctrine in Brogan v. United States, reasoning that the plain text of the statute criminalized even "mere" denials of guilt. But despite the statute's plain language, Justices Souter and Ginsburg wrote to emphasize the

54. See Safire, supra note 51.
55. United States v. Tabor, 788 F.2d 714 (11th Cir. 1986).
56. Marzani v. United States, 168 F.2d 133 (D.C. Cir. 1948).
58. See id. at 401-05 (majority opinion) (summarizing "exculpatory no" doctrine and cases); Tabor, 788 F.2d 714 (applying doctrine to overturn the conviction of a notary who had, in conversation with an IRS agent, falsely denied employing improper notarizing procedure); United States v. Stoffey, 279 F.2d 924, 927 (7th Cir. 1960).
59. See, e.g., Tabor, 788 F.2d at 717-19.
60. 522 U.S. at 400-01.
dangers of prosecutorial overreach and to urge Congress to amend the law (two other justices dissented on the grounds that Congress did not intend to criminalize the "exculpatory no").\textsuperscript{61} Even after \textit{Brogan}, the courts continue to adopt statutory constructions to narrow what would otherwise be virtually unlimited prosecutorial discretion.\textsuperscript{62} And yet, as discussed above, section 1001 actually provides significantly more safeguards than section 6(c)(2). This should be, to say the least, cause for concern.

As discussed above, a host of academics and commentators have criticized the government’s use of section 1001, claiming the statute has become “a bedrock of the federal process crimes charging practices, and that there is at the very least a perception that some of those charges are pretextual and that some are retributive, in the sense that the government pursues persons who have not broken any laws.”\textsuperscript{63} If prosecutors have overreached in their use of section 1001, how much more will regulators be tempted to abuse the laxer standards of section 6(c)(2)? What is to stop the CFTC from seeking to elicit a false statement from a defendant in order to compel a guilty plea on underlying substantive charges, or dispensing with substantive charges in favor of the easier-to-prove false statement claims?\textsuperscript{64}

The extraordinary breadth of section 6(c)(2) can be glimpsed in the recent \textit{Butterfield} action.\textsuperscript{65} In that case, the CFTC interviewed Susan Butterfield in connection with her employment at a company registered with the Commission. Butterfield told her CFTC interviewers she had never “pre-stamped” order tickets (which undermines the reliability of audit trails). In the course of that same interview, Butterfield was confronted with evidence that she had in fact pre-stamped tickets, and she recanted her earlier testimony.\textsuperscript{66} Despite the fact that she recanted her testimony in the same interview, and the fact that the CFTC did

\begin{itemize}
\item \textsuperscript{61} See \textit{id.} at 408-18 (Ginsburg, J., concurring in the judgment); \textit{id.} at 418-21 (Stevens, J., dissenting).
\item \textsuperscript{62} See, e.g., United States v. Culliton, 328 F.3d 1074, 1078 (9th Cir. 2003) (per curiam) (noting that a “fundamentally ambiguous” question cannot form the basis for a false statement prosecution); United States v. Gatewood, 173 F.3d 983, 988 (6th Cir. 1999) (holding that government must negate “any reasonable interpretation that would make the defendant’s statement factually correct”). \textit{See generally} Todd S. Kurihara & Kenneth T. Whang, \textit{False Statements and False Claims}, 44 AM. CRIM. L. REV. 491, 503-04 (2007) (collecting judicially devised defenses to section 1001).
\item \textsuperscript{64} See \textit{id.} at 1495.
\item \textsuperscript{66} See \textit{id.} at 2-4.
\end{itemize}
not charge or prove that her underlying behavior was illegal, Butterfield eventually settled the false statement action for $50,000. One trade blog examining the case noted that Butterfield was not the target of a fraud investigation and that her false statements never actually misled the CFTC's investigators, prompting the commentators to ask whether the provision's use in this case was justifiable. The settlement sum in Butterfield was relatively small, but the fact that it was levied on a clerical worker—who recanted her testimony in the same interview in which she made the false statements—demonstrates the striking power of section 6(c)(2) and should make us wary of the law's potential applications.

III. Moving Forward: The Search for a Limiting Principle

At a 2012 conference, the CFTC's Director of Enforcement was asked how the CFTC would protect against abuse of its new false statement authority. He reportedly answered that the CFTC exercises discretion "all the time" and that he trusts in the professionalism of his staff. But given what we have seen of section 6(c)(2)'s breadth (and the example of section 1001), some external limiting principle seems necessary. Happily, there are several such principles available. This Comment will briefly review several such principles without arguing for their relative attractiveness, before arguing that, at the least, Congress should heighten the provision's mens rea requirement so as to avoid penalizing individuals who unknowingly misstate a fact to the Commission.

Much scholarship has sought to cabin the reach of section 1001 to conduct that is appropriately criminalized. This scholarship could profitably be applied to revising section 6(c)(2) and designing future provisions granting similar false statement authority to other regulatory agencies. For instance, one author has

67. The consent order states only that pre-stamping tickets "may constitute a violation of Commission Regulations . . . and may facilitate unlawful trade allocation schemes." Id. at 2. (emphasis added).


69. Admittedly, Butterfield recanted her story only after being confronted with contrary evidence. But there is nothing in the law that would obviously prevent false statement charges even if she had unilaterally recanted without such evidence.

70. See Roth, supra note 2.

71. Id.

72. See, e.g., Bak-Boychuk, supra note 32, at 473 (describing various judicial strategies for limiting section 1001); Morrison, supra note 49; Schwartz, supra note 53 (arguing that subjects of investigation should not be targeted by section 1001 because of the possibility of prosecutorial abuse, but that witnesses who make false statements may properly be targeted).
followed the lead of some courts in suggesting that false statements given voluntarily and not made under oath should not be criminalized under section 1001, as these are not statements the law was meant to target.\textsuperscript{73} Congress might apply this reasoning to limit the scope of section 6(c)(2). Alternatively, the provision's scope could be restricted to statements that are "active, positive, and aggressive lies made to the government, at the statement-maker's initiation, in order to obtain some benefit."\textsuperscript{74} Or the "exculpatory no" doctrine, dismantled in the section 1001 context by Brogan, could be resurrected in the section 6(c)(2) context.\textsuperscript{75}

At the very least, Congress should heighten the mens rea requirements for section 6(c)(2). While the current language relieves the CFTC of the difficult job of proving that an individual knew he was lying, it also exposes individuals to significant liability for voluntarily attempting to offer the Commission information the individual believes is true. Under the statute as written, a momentary slip of the tongue, or even a fleeting bout of forgetfulness, can create massive civil liability. A simple hypothetical illustrates the dangers of the current mens rea standards. Suppose the Commission asks a businesswoman on what day her partner executed a certain transaction. Her calendar shows that the transaction occurred last Tuesday, and she should therefore reasonably know that information, but for some reason she forgets and states that it occurred on Wednesday. Assuming the context is such that the misstatement is material (perhaps, unbeknownst to the businesswoman, the culpability of her partner turns on the date the transaction was executed), the businesswoman has just unintentionally violated section 6(c)(2).\textsuperscript{76} And as Butterfield indicates, the businesswoman may not be able to remedy the violation even by correcting herself in the same interview.

\textsuperscript{73} See Morrison, supra note 49, at 115. Morrison cites a number of decisions reaching this conclusion. See, e.g., United States v. Bedore, 455 F.2d 1109, 1110 (9th Cir. 1972) (defendant giving a false name to the FBI "was not within the class of false statements that section 1001 was designed to proscribe"); United States v. Ehrlichman, 379 F. Supp. 291, 291-92 (D.D.C. 1974) ("Congress did not intend that [the provision] be applied to statements given to the F.B.I. voluntarily and without oath or verbatim transcription during an interview initiated by the Bureau in the course of a criminal investigation."); United States v. Stark, 131 F. Supp. 190, 206 (D. Md. 1955) ("[T]he legislative intent in the use of the word 'statement' does not fairly apply ... where the defendants did not volunteer any statement or representation for the purpose of making claim upon or inducing improper action by the government against others ... ."); United States v. Levin, 133 F. Supp. 88, 89 (D. Colo. 1953) (concluding that it does not violate section 1001 "to intentionally fail to tell the truth to any investigator of any agency of the United States" when "under no legal obligation to speak").

\textsuperscript{74} See Morrison, supra note 49, at 138-39.

\textsuperscript{75} Because Brogan was a statutory interpretation case limited to section 1001, it is of course not binding in the section 6(c)(2) context. And Congress is free to simply amend the provision to make clear that it does not apply to "exculpatory nos."

\textsuperscript{76} In fact, the CFTC must only prove that the \textit{preponderance of the evidence} indicates that the transaction had occurred on Tuesday.
Congress might therefore consider mirroring the mens rea requirements of section 1001 by requiring the CFTC to prove that a defendant knowingly and willfully made false statements.\textsuperscript{77} While this would make the CFTC’s job harder in some instances—and perhaps detract from the deterrence benefits provided by the provision—these sacrifices are justified by the importance of preventing agency overreach.

**Conclusion**

Section 6(c)(2) attempts to remedy a very real gap in the regulatory enforcement scheme. But in doing so, the provision fails to provide minimal safeguards to prevent abuse of discretion and over-enforcement. The pendulum has swung too far. Despite these failings, at least one former SEC official has suggested that that agency would like false statement authority comparable to that of the CFTC.\textsuperscript{78} Congress has not yet demonstrated any intention of granting other regulatory agencies such authority, but given the significant benefits that section 6(c)(2) provides, such a request is not outlandish. Congress should consider granting other regulatory agencies the power to pursue persons who make false representations, but this power should be cabined by appropriately high mens rea standards (and perhaps other safeguards surveyed above). While this Comment has attempted to briefly sketch several plausible limiting principles, more undoubtedly exist. The present moment—when this new power is still in its infancy and before it has been granted to other agencies—is the time for courts, academics, and legislators to consider how best to share the provision’s benefits with other agencies while instituting reasonable safeguards against government abuse.

\textsuperscript{77} Under established precedent, this standard also encompasses liability for reckless disregard of the truth, so that the CFTC would not need to prove actual knowledge in every case. See, e.g., United States v. Evans, 559 F.2d 244, 245-46 (5th Cir. 1977) (collecting cases for the proposition that “reckless disregard for the truthfulness of the statement” satisfies a “knowingly and willfully” mens rea standard); see also United States v. London, 66 F.3d 1227, 1241-42 (1st Cir. 1995) (same).

\textsuperscript{78} See supra note 4 and accompanying text.